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Recent Cases

Cornelia H. Boozman

R. Preston Bolt, Jr.

Kenneth L. Stewart

RECENT CASES

Administrative Law—Ripeness—Agency Head's Informal Opinion Letters Held Unripe for Review When No Substantial Hardship Placed on Parties

I. Facts and Holding

Plaintiffs, New York Stock Exchange (NYSE) and Investment Company Institute (ICI),[1] sued for declaratory and injunctive relief[2] against two informal letters of opinion written by Defendant, the Comptroller of the Currency, to Security Pacific National Bank.[3] Plaintiffs opposed the Comptroller's opinion that the bank's proposed automatic stock purchasing service (AIS)[4] complied with the Glass-Steagall Act.[5] Rejecting the Comptroller's threshold argu-

1. Investment Company Institute is a national association of mutual funds, their investment advisors, and their principal underwriters.

2. *See* note 5 *infra.*

3. The letters were written in response to a request by the bank for the Comptroller's opinion as to whether the bank's proposed automatic stock-purchasing program would he consistent with §§ 16 and 21 of the Glass-Steagall Act. These sections of the Act strictly limit the authority of banks to purchase, sell, issue, underwrite, distribute, or otherwise deal in stocks and securities. Section 16 provides in pertinent part:

> The business of dealing in securities and stock by [a national banking] association shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers, and in no case for its own account, and the association shall not underwrite any issue of securities or stock: *Provided,* That the association may purchase for its own account investment securities under such limitations and restrictions as the Comptroller of the Currency may by regulation prescribe.

Banking Act of 1933, § 16, 12 U.S.C. § 24(7) (1970). Section 21 provides in pertinent part:

> (a) . . . it shall be unlawful—
>
> (1) For any person, firm, corporation, association, business trust, or other similar organization engaged in the business of issuing, underwriting, selling, or distributing, at wholesale or retail, or through syndicate participation, stocks, honds, dehentures, notes, or other securities, to engage at the same time to any extent whatever in the business of [deposit banking]: *Provided,* That the provisions of this paragraph shall not prohibit national banks . . . from dealing in, underwriting, purchasing, and selling investment securities to the extent permitted . . . by the provisions of section 24 of this title . . . .

12 U.S.C. § 378(a)(1) (1970).

4. The bank's proposed "Automatic Investment Service" (AIS) would allow the bank's regular checking account customers to invest in stocks individually selected by the customer from a list provided to them by the bank through automatic monthly deductions from their accounts. The deductions and investments would he made each month until the customer ended his participation in the program.

5. Security Pacific National Bank first wrote to the Comptroller on February 12, 1973, describing AlS and inquiring as to its compliance with the Glass-Steagall Act. On February 27, 1973, the Comptroller responded to the inquiry with a letter summarily concluding that AIS would be consistent with the Act. On August 15, 1973, ICI wrote a letter and supporting

ments that the challenged agency action was not ripe for review, that Plaintiff NYSE lacked standing to sue,[6] and that Plaintiffs had failed to join indispensable parties,[7] the district court granted summary judgment for the Comptroller on the merits.[8] On appeal to the Court of Appeals for the District of Columbia Circuit, *held,* reversed.[9] An informal opinion letter issued by a federal administrative agency is not ripe for judicial review when the challenged opinion lacks finality, fails to address a purely legal issue, and places no substantial and immediate hardships on the parties seeking review. *New York Stock Exchange, Inc. v. Bloom*, 562 F.2d 736 (D.C. Cir. 1977).

II. LEGAL BACKGROUND

The basic premise of the ripeness doctrine is that judicial machinery should operate only on concrete problems that are present or imminent, not on problems that are abstract, hypothetical, or remote.[10] Although the doctrine's theoretical objective of judicial economy is sound, its application in challenges to administrative actions of government agencies has lacked coherence and consistency. Early courts striving to develop a standard by which to determine the ripeness of an agency action for judicial review vacillated between an approach that emphasized the form of a challenged agency action and one that focused on the effect of the action on the

memorandum requesting the Comptroller to reconsider his position, and NYSE filed a similar request on September 7, 1973. The Comptroller's office informed Security Pacific of ICI's request for reconsideration of the February 27 advisory opinion and invited Security Pacific's comments. Accordingly, Security Pacific submitted a memorandum supporting the February 27 ruling; ICI and NYSE submitted opposing memoranda. On June 10, 1974, the Comptroller sent a letter to ICI, containing a more extensive analysis of the issues and reaffirming his opinion that AIS did not violate the Glass-Steagall Act. ICI and NYSE then filed an action in the District Court for the District of Columbia requesting: (1) a declaratory judgment that AIS was unlawful under §§ 16 and 21 of the Glass-Steagall Act, and consequently that the Comptroller's informal opinion of June 10, 1974, exceeded his statutory authority; (2) an injunction requiring the Comptroller to withdraw his June 10 ruling and to refrain from "approving" the operation of AIS hy any commercial bank; and (3) an injunction forbidding the Comptroller from "continuing in effect" any "approvals" that may have heen given to other banks. New York Stock Exchange, Inc. v. Bloom, 562 F.2d 736, 737-39 (D.C. Cir. 1977).

6. The Comptroller raised the standing issue only against NYSE in support of his motion for summary judgment.

7. This claim was not argued on appeal.

8. New York Stock Exhange, Inc. v. Smith, 404 F. Supp. 1091 (D.D.C. 1975).

9. The Court of Appeals for the District of Columbia Circuit vacated the decision of the district court and remanded the case with instructions to dismiss the complaint. 562 F.2d at 743.

10. 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 21.01 (1958).

parties seeking review. In *Standard Computing Scale Co. v. Farrell,*[11] for example, the Supreme Court acknowledged that "specifications" issued by the New York Superintendent of Weights and Measures had caused injury to the plaintiff's business,[12] but held that the specifications were not ripe for review because they had not been issued in the form of a "regulation" or "law."[13] In *United States v. Los Angeles & Salt Lake Railway,*[14] however, the Court found an order of the Interstate Commerce Commission affecting interstate carriers unripe for judicial scrutiny because the order did not impose any obligations, deny any rights, subject the carrier to any liability, or change the existing or future status of the carrier.[15] The Court stressed both the effects of delaying judicial determination on the party opposing agency action and the form of the challenged action in *Columbia Broadcasting System, Inc. v. United States.*[16] Although the Federal Communications Commission (FCC) characterized its challenged regulations as merely "announcements of policy," the Court found that these announcements represented a valid exercise of administrative rulemaking power and thus were in sufficiently final form for review.[17] The Court seemed to find more significant, however, the irreparable injury that would have resulted to the plaintiff if review of the regulations had been delayed until later proceedings.[18] According to the Court, the need for immediate review to prevent such irreparable injury was the "ultimate test of reviewability."[19] The Court applied this ultimate test in *United States v. Storer Broadcasting Co.*[20]

11. 249 U.S. 571 (1919).

12. The Court noted that, as a result of the specifications, plaintiff's sales had diminished and collection of payment for scales previously sold had become difficult. *Id.* at 573.

13. *Id.* at 577.

14. 273 U.S. 299 (1927).

15. *Id.* at 310.

16. 316 U.S. 407 (1942).

17. The Court concluded: "When, as here, the regulations are avowedly adopted in the exercise of [the administrative rulemaking] power [and] coucbed in terms of command . . . they must be taken by those entitled to rely upon tbem as what they purport to be—an exercise of the delegated legislative power . . . ." *Id.* at 422.

18. The "irreparable injury" was the wholesale cancellation of contracts by plaintiff's affiliates that the FCC regulations would induce. *Id.* at 423.

19. The Court stated:

> The ultimate test of reviewability is not to be found in an overrefined technique, but in the need of the review to protect from the irreparable injury threatened in the exceptional case by administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudications that may follow, the results of which the regulations purport to control.

Id. at 425.

20. 351 U.S. 192 (1956).

and found that FCC regulations not yet specifically applied to the plaintiff were nevertheless ripe for review because the plaintiff had been affected adversely by the regulations.[21]

Even when the courts purported to focus on the effects of administrative actions, they continued to emphasize the form of such actions and often refused judicial review of informal opinions or announcements adversely affecting the complaining parties. In *Helco Products Co. v. McNutt*[22] the Commissioner of Food and Drugs advised a company wishing to transport dyed poppy seeds in interstate commerce that such artificial coloring would be illegal adulteration. The Court held that the informal opinion of the Commissioner failed to constitute the requisite controversy for a declaratory judgment. Thus the company was faced with the choice of either complying and suffering injury to its business or not complying and risking criminal prosecution for such violation. Similarly, in *Public Utilities Commission v. United Air Lines, Inc.*,[23] the Supreme Court refused to review challenged actions of the California Public Utilities Commission, which had "advised" and "instructed" United Air Lines to file certain tariffs. The Court refused review because of the informality of the instructions, ignoring the real and immediate dilemma facing United of obeying the instructions and submitting to dual regulation by the Commission and the Civil Aeronautics Board or violating them and risking a criminal penalty. Although the complaining parties in these cases had a vital interest immediately threatened by either informal agency action or delay of judicial determination until enforcement proceedings, the courts exhibited an insensitivity to the plights of the parties and a preoccupation with formality.[24]

In 1956 the Supreme Court broke through the formality barrier, conceding that form could be outweighed by effects. The Court stated in *Frozen Food Express v. United States*[25] that the interest of a court and an agency in postponing review of an administrative action until the question arises in a more concrete and final form can be outweighed by the interests of those seeking relief from a

21. The regulations were in effect controlling the plaintiff's business affairs; he could not plan to enlarge the number of his stations because the FCC, on the basis of the rules, denied his application for an additional station. *Id.* at 199-200.

22. 137 F.2d 681 (D.C. Cir. 1943).

23. 346 U.S. 402 (1953).

24. *See also* Longshoremen's Local 37 v. Boyd, 347 U.S. 222 (1954); Eccles v. Peoples Bank, 333 U.S. 426 (1948); United Public Workers v. Mitchell, 330 U.S. 75 (1947).

25. 351 U.S. 40 (1956).

challenged action's "immediate and practical impact" upon them.[26] The Court extended this pragmatic approach to the effects of administrative actions on parties in *Bantam Books, Inc. v. Sullivan,*[27] in which it reviewed the constitutionality of an administrative agency's informal exhortations even though the agency had no authority to impose any formal, legal sanctions. Recognizing that the agency's informal exhortations effectively regulated the types of books sold by the party seeking review,[28] the Court looked beyond the legal form of the agency action to its substance and held that such action had a sufficiently material effect on the party to warrant review.

The Supreme Court articulated a more definitive standard for determining ripeness in *Abbott Laboratories v. Gardner.*[29] Espousing what it considered to be the basic rationale of the ripeness doctrine, avoidance of premature adjudication of discretionary administrative policies,[30] the Court established a procedure for evaluating the ripeness issue in challenges to administrative actions. The *Abbott Laboratories* standard required evaluation of both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. The Court considered two factors in finding the regulations challenged in *Abbott Laboratories*[31] fit for judicial determination. First, the Court emphasized that the issue presented was a "purely legal" one and did not require review of any factual determinations traditionally left to the finder of fact.[32] Second, the Court found the regulation in question to be "final

26. *Id.* at 44.

27. 372 U.S. 58 (1963).

28. *Id.* at 68-71. Rhode Island set up a "Commission to Encourage Morality in Youth," which made "informal recommendations" to book distributors as to books unsuitable for sale to children. The recommendations often were followed by threats of prosecution for distributing obscenity; consequently, distributors were effectively discouraged from selling such books. Thus the plaintiff-publisher was injured by the distributors' refusal to distribute the books in question and their steps to stop furtber circulation of such books. *See id.* at 61-64.

29. 387 U.S. 136 (1967).

30. The Court concluded:

> [T]he ripeness doctrine's . . . basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administative decision has been formalized and its effects felt in a concrete way by the challenging parties.

Id. at 148-49.

31. The case involved a challenge to regulations promulgated by the Commissioner of Food and Drugs.

32. The court noted that all parties agreed that the issue was purely legal—whether the Commissioner's regulations had construed properly a statute—without trying to justify or attack the regulations in factual terms. *Id.* at 149.

agency action" because it was promulgated in a formal manner after public announcement and considerable deliberation and because there was no evidence that it was intended to be informal or tentative. Applying the second part of its standard, the Court decided that the impact of the regulation upon the petitioners' conduct of their business affairs was sufficiently "direct and immediate" to require prompt judicial review.[33] With its decision in *Abbott Laboratories,* the Supreme Court thus began examining form and effect concurrently, rather than alternating between form in one case and effect in the next.[34]

Lower courts repeatedly have followed the *Abbott Laboratories* standard.[35] The District of Columbia Circuit adopted the standard and applied it in *National Automatic Laundry & Cleaning Council v. Schultz (NALCC),*[36] finding ripe for review a letter from the Administrator of the Wage-Hour division to the NALCC.[37] Evaluating the fitness of the issue for judicial scrutiny, the court found the issue to be "purely legal"[38] and the administrator's opinion to be final agency action.[39] The court indicated that an informal agency opinion is presumptively final for review if it is approved by the agency head, arises out of substantial deliberation, is not labeled as tentative or otherwise qualified by arrangement for reconsideration, is likely to be accepted as authoritative, and has the feature of expected conformity.[40] The court also found that delaying judicial scrutiny would result in sufficient hardship on the plaintiffs to justify immediate review.[41]

33. Petitioners were faced with the costs of compliance, adapting their promotional material and labeling to the regulation's requirements, or the risks of noncompliance, serious criminal and civil penalties. *Id.* at 152-53.

34. *Id.* at 149, 153.

35. *See, e.g.,* Atlantic Richfield Co. v. FTC, 546 F.2d 646 (5th Cir. 1977); A.O. Smith Corp. v. FTC, 530 F.2d 515 (3d Cir. 1976); Banker's Life & Cas. Co. v. Callaway, 530 F.2d 625 (5th Cir. 1976); Florida v. Weinberger, 492 F.2d 488 (5th Cir. 1974); Air Line Pilots'Ass'n Int'l v. Department of Transp., FAA, 446 F.2d 236 (5th Cir. 1971).

36. 443 F.2d 689 (D.C. Cir. 1971).

37. NALCC is a national trade association for the coin-operated laundry and dry cleaning industry.

38. The issue was whether the Administrator properly had construed 1966 amendments to the Fair Labor Standards Act. 443 F.2d at 695.

39. The *NALCC* court dealt with finality not in its analysis of fitness of the issues for review, but as an issue independent of the fitness issue. *See also* Bethlehem Steel v. EPA, 536 F.2d 156 (7th Cir. 1976); Banker's Life & Cas. Co. v. Callaway, 530 F.2d 625, 631 (5th Cir. 1976); Independent Bankers' Ass'n of America v. Smith, 534 F.2d 921 (D.C. Cir. 1976); A.O. Smith Corp. v. FTC, 530 F.2d 515, 521 (3d Cir. 1976). Until *Abbott Laboratories* ripeness and finality often were treated as separate issues.

40. 443 F.2d at 701-02.

41. Similar to the situation of the plaintiffs in *Abbott Laboratories,* the plaintiffs in

In *Continental Air Lines, Inc. v. CAB*[42] the District of Columbia Circuit again applied the *Abbott Laboratories* standard in examining CAB orders establishing a new seating configuration policy. In regard to fitness of the issues for judicial review, the court found the issue to be a question of proper statutory construction and therefore "purely legal."[43] The court stated that the label an agency attaches to its actions is not determinative of finality, and consequently, that an action may be reviewable even though it is merely an announcement of a rule or policy not yet put into effect by the agency or one that will never have any formal, legal effect.[44] The court noted, however, that if a challenged agency position is likely to be abandoned or modified before actuelly put into effect, it is not the agency's final position and review will waste the court's time.[45] Focusing on the hardship to the parties, the court found that both the financial burdens of compliance—the costs of changing seating configurations in airplanes—and the risk of sanctions for noncompliance caused sufficient injury to the plaintiff to necessitate immediate review.[46] Thus *Abbott Laboratories'* concern with fitness of the issues for review and hardship on the parties contesting an agency action has become the established standard for determining ripeness for judicial review in suits challenging administrative actions.

III. The Instant Opinion

Deeming the ripeness issue to be determinative in the instant case,[47] the court expressed its adherence to the *Abbott Laboratories* standard in its examination of the ripeness for judicial scrutiny of the Comptroller's letters of opinion. The court first dealt with the question of the finality of the Comptroller's action in evaluating the fitness of the action for review. Although the court acknowledged that the letters were sigued by the agency head and that the second letter contained an extensive analysis based on consideration of adverse legal memoranda, it stressed the informality of the letters

NALCC faced the dilemma of incurring the adverse financial consequences of compliance or risking the litigation and penalties of noncompliance. *Id.* at 696-97.

42. 522 F.2d 107 (D.C. Cir. 1974).

43. The statute heing construed was the Federal Aviation Act of 1958, § 401(e)(4), 49 U.S.C. § 1371(e)(4) (1970).

44. 522 F.2d at 124.

45. *Id.* at 125.

46. *Id.* at 126-28.

47. The other issues before the court—the thresbold issue of standing and the substantive issue of tbe Comptroller's opinion, the compatibility of AIS with the Glass-Steagall Act—were not decided.

and the tentative nature of the Comptroller's interpretative conclusions.[48] The court also recognized that the Comptroller had stated what appeared to be a relatively final position on the consistency of AIS with the Glass-Steagall Act.[49] It reasoned, however, that this position, based only on a proposed AIS program, would be compatible with any future finding, based on evidence from AIS's actual operation, that it generated hazards sufficient to create a violation of the Act.[50] The court thus concluded that the letters were not formal rules or policy statements and distinguished them from the opinion letter in *NALCC*.[51]

The court next addressed the second criterion for assessing the appropriateness of an agency's actions for judicial review and rejected the lower court's finding that the Comptroller's opinion responded to a "purely legal" question. The court acknowledged that determining the congressional intent behind the enactment of the Glass-Steagall Act would be solely a matter of law, but it stated that determining whether AIS would come within the scope of legislative concerns would require an assessment of facts surrounding the actual operation of AIS and an application of law to those facts.[52]

Concluding that the challenged agency action was unfit for judicial resolution, the court turned to the problem of hardship to the parties. The court compared the effect on NYSE and ICI of withholding judicial review with the injury to the plaintiffs in *Abbott Laboratories, NALCC,* and *Continental Air Lines*[53] and found that Plaintiffs in the instant case had not made a sufficient showing of substantial and immediate hardship from either the Comptroller's action or the deferral of judicial review until the is-

48. The court concluded that the letters of opinion reflected their tentative nature in that the Comptroller reserved the option of changing his opinion. 562 F.2d at 741.

49. *Id.*

50. *Id.*

51. The court found it significant that the letter in *NALCC* expressed a statutory interpretation that could be deemed final and conclusive because it was based on legislative history alone. To the contrary, the court felt that the Comptroller's letters reserved the possibility that he might change his position if presented with concrete factual evidence that AIS produced conditions that the Glass-Steagall Act was intended to prevent. *Id. See also* note 38 *supra* and accompanying text.

52. *Id.*

53. The court noted the severe alternatives faced by the plaintiffs in these three cases. To obtain later judicial review, they would have had to accept the adverse consequences of complying with agency rulings or risk serious penalties and possible prosecution for noncompliance. The court found no such dilemma before Plaintiffs NYSE and ICI since they were not directly regulated by the agency and the agency action was not applicable to them. *Id. See also* notes 33, 41 & 42 *supra* and accompanying text.

sues were more concrete.[54] The court rejected both the district court's assumption that denial of immediate review would preclude the Plaintiffs' claim from ever coming under judicial examination[55] and the Plaintiffs' contention that to require the initiation of numerous private actions against banks offering AIS would be unduly burdensome.[56] Finding neither fitness of the issues for judicial scrutiny nor sufficient hardship to the parties from withholding court consideration, the court held the Comptroller's challenged action unripe for review.

IV. COMMENT

The instant court's analysis of the ripeness issue represents a retreat from *Abbott Laboratories'* pragmatic concern for hardship to the parties to the restrictive concern for formality evidenced in early decisions.[57] The court's narrow application of the *Abbott Laboratories* standard upsets the balance between the form of an agency action and the effect on the parties of withholding judicial review that the standard was intended to create. Consequently, parties threatened with irreparable injury from adverse agency opinions may be denied access to the courts because the challenged action cannot be categorized as a "law," "regulation," or "final order." Such a formalistic approach overlooks the immediate and substantial barm that can result from agency action that may never bave any formal, legal effect on the parties.[58]

In applying the *Abbott Laboratories* standard in the instant case, the court deviated from its earlier application of the standard in *NALCC* and *Continental Air Lines.* Its conclusion that the Comptroller's opinion letters were tentative and therefore unfit for judicial review ignores the *NALCC* principle that a letter signed by an agency head, not tentative on its face and growing out of substantial deliberation, is "presumptively final" for purposes of judicial review even though the agency legally could reconsider the opinion.[59] This principle, together with the court's recognition that the

54. The court noted that the Plaintiffs' conduct was not regulated directly by the Comptroller's action. 562 F.2d at 741.

55. The court hinted that Plaintiffs would have a right of private action against banks offering AIS and similar programs. *Id.* at 742.

56. The court suggested that a single successful private action might be equally effective in convincing the Comptroller to alter his position regarding AIS. *Id.*

57. *See* notes 11-13 *supra* and accompanying text.

58. *See* note 44 *supra* and accompanying text.

59. *See* note 41 *supra* and accompanying text.

disputed opinion appeared to be final,[60] was being relied upon as official, and actually was encouraging banks to institute AIS programs, demonstrates that the letters were sufficiently final for judicial review. The court's refusal to characterize the statutory construction question decided by the Comptroller as "purely legal" is equally untenable since the statutory interpretation in the instant case involves no more factual determination than did the statutory construction questions in *Abbott Laboratories, NALCC,* and *Continental Air Lines,* all of which were held to be purely legal.[61]

In addressing the second part of the *Abbott Laboratories* standard, which focuses on the impact of adverse agency action on the parties, the court once again departed from the pragmatic approach evidenced in recent cases. The court found only insubstantial hardship on the Plaintiffs because their conduct was not regulated directly by the agency action in question and because they were not faced with having to choose between burdensome compliance and risky noncompliance.[62] The inconsistency of this reasoning is apparent. Because the agency action was favorable to those directly regulated by the agency, banks offering AIS, only nonregulated parties would be injured by the Comptroller's opinion letters. Consequently, under the court's rationale, the Comptroller's opinion would never be subject to review since the resulting hardship suffered by nonregulated parties, the only parties who would seek review, would be deemed insufficient for judicial consideration. The court's analysis ignores that, at the time of the challenge, banks were offering AIS to customers as a direct result of the Comptroller's letters, thereby injuring NYSE and ICI, who previously had been free of bank competition in security sales.

In disposing of Plaintiffs' contention that denial of review would result in substantial hardship, the court "supposed" that Plaintiffs would have a right of private action by which to address injuries caused by banks providing AIS without making any conclusive determination whether the express language of the statute authorized such an action.[63] The court's conclusion that the inconvenience of having to initiate numerous private actions was not a hardship sufficient to justify immediate review[64] is inconsistent with the

60. *See* note 49 *supra* and accompanying text.
61. *See* notes 32, 38 & 42 *supra* and accompanying text.
62. *See* note 54 *supra* and accompanying text.
63. *See* 562 F.2d at 742.
64. *See* note 56 *supra* and accompanying text.

principle of judicial economy[65] since less of the court's time would be spent in immediately reviewing the merits of a challenged action than would be spent in deciding a potentially large number of private suits.

Policy considerations mandate liberal application of the *Abbott Laboratories* standard to allow hardship on the parties to outweigh respect for formality. Current concern over protection of individual rights necessitates that the courts risk expending their energies on a possibly premature issue to avoid closing their doors to those who actually might be injured by agency action. If the balance between form and injury is close, deference should be given to the party alleging injury. Courts must acknowledge the adverse effect that even informal expressions from administrative agencies may have on a person or his business, as evidenced by the injury to the businesses of NYSE and ICI. Courts also must recognize that parties affected by adverse agency action naturally consider such action as authoritative and proceed in their affairs in reliance on this belief without deliberating as to whether the action is "final."[66] Preenforcement review at the request of those who have an interest in adjudication of an agency action should be allowed to prevent or mitigate possible losses.[67]

The desire to avoid judicial examination of hypothetical or abstract claims, which supports a strict application of the ripeness doctrine, does not require that injured parties be denied judicial review. Courts striving for judicial economy might better expend their time and energy by examining the merits of challenges to agency action instead of becoming engrossed in semantics and form in evaluating ripeness.[68] If no real controversy exists, courts should be able to dispense with a complaint in terms of standing, real party in interest, appropriate remedies, and in only the most obvious

65. *See* note 9 *supra* and accompanying text.

66. The general public is not concerned with the form of agency actions. When a government official espouses some policy or opinion, people respect it as being official without considering whether it is a "regulation," "order," "informal opinion," or "announcement of policy." The burden of making such distinctions should not be on the public; rather, agency officials should make their intentions obvious. *See generally* note 17 *supra* and accompanying text.

67. It is only logical that banks desiring to initiate AIS programs would want to know if their proposed programs would be compatible with existing laws and regulations before incurring the extensive costs of putting them into operation.

68. Since the parties are before the court and the court most likely has read their briefs and is familiar with the facts and arguments of eacb party, perhaps the court should examine the merits of the case instead of occupying its time with the thresbold ripeness issue.

cases, ripeness.[69] Liberal application of the *Abbott Laboratories* pragmatic approach to the issue of ripeness will afford review to parties suffering injury from adverse agency action unless the injury is obviously insubstantial and remote.

CORNELIA H. BOOZMAN

Civil Procedure—Res Judicata—Challenge of Racial Discrimination under 42 U.S.C. § 1981 Barred by Prior Submission of Civil Rights Question to State Court

I. FACTS AND HOLDING

Plaintiff, a black female, brought suit under 42 U.S.C. § 1981,[1] alleging that her dismissal by Defendant[2] was the result of racial discrimination. Defendant sought dismissal of the suit, claiming that affirmance by the Appellate Division of the New York Supreme Court of the dismissal of Plaintiff's complaint by the State Division of Human Rights[3] had res judicata effect barring a section 1981 action seeking similar relief. Plaintiff asserted that procedural inad-

69. In the instant case, the court should have found the injury to the Plaintiffs' business sufficient to warrant immediate review. A satisfactory outcome could also have been reached, however, by forcing Plaintiffs to join banks already offering AIS as indispensable parties. Certainly the court could not have denied the impact of the agency's position on those parties, justifying the need for immediate review of a real controversy.

1. 42 U.S.C. § 1981 (1970) provides:

> All persons within the jurisdiction of the United States shall have tbe same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be suhject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

In addition to suing under § 1981, a victim of racial discrimination could seek judicial relief under the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1970), or the Civil Rights Act of 1964, tit. VII, 42 U.S.C. § 2000e (1970), or be could file a complaint with a state agency or with the Equal Employment Opportunity Commission, pursuant to 42 U.S.C. § 2000e-5(b) (1970). Mitchell v. National Broadcasting Co., 553 F.2d 265, 277 (2d Cir. 1977) (Feinberg, J., dissenting).

2. Plaintiff, employed by Defendant National Broadcasting Company on March 13, 1972, was placed on probation for thirty days on October 17, 1973, allegedly because of poor work performance and an uncooperative attitude, and was formally dismissed on November 19, 1973.

3. Pursuant to N.Y. EXEC. LAW § 297 (McKinney 1972), Plaintiff first challenged her dismissal before the New York State Division of Human Rights, an administrative agency with broad authority to eliminate unlawful discriminatory practices.

equacies in the state administrative and judicial proceedings[4] and the substantial policy considerations[5] supporting federal civil rights actions should preclude application of res judicata in a section 1981 action. Finding that the state administrative and judicial proceedings barred a subsequent action under section 1981, the United States District Court for the Southern District of New York dismissed the action.[6] On appeal to the Second Circuit Court of Appeals, *held,* affirmed. Voluntary submission of a civil rights question to a state court has res judicata effect barring a subsequent federal challenge under 42 U.S.C. § 1981. *Mitchell v. National Broadcasting Co.,* 553 F.2d 265 (2d Cir. 1977).

II. LEGAL BACKGROUND

In *Southern Pacific Railroad v. United States*[7] the Supreme Court stated that a "right, question, or fact" distinctly put in issue and directly determined by a court acting within its jurisdiction cannot be disputed in a subsequent suit between the same parties.[8]

4. Division proceedings consisted of two conferences with two different officials of the Division in which Plaintiff, Defendant's attorneys, and the officials engaged in "informal discussions." Plaintiff was not represented by counsel and apparently presented no documented evidence supporting her position. The attorneys for Defendant submitted documents in the form of office correspondence and oral testimony to support its position. The Division officials found no probable cause to believe that Defendant had discriminated against Plaintiff. Pursuant to N.Y. EXEC. LAW § 297-a (McKinney 1972 & Supp. 1976), Plaintiff appealed to the State Human Rights Appeal Board, an adjudicatory authority independent of the Division of Human Rights. The Appeal Board's scope of review was limited by § 297-a(7) to determining whether the decision of the Division was: (a) in conformity with the constitution and the laws of the state and tbe United States; (b) witbin the Division's jurisdiction; (c) made in accordance with required procedures; (d) supported by substantial evidence; and (e) not arbitrary, capricious, or an abuse of discretion. Plaintiff also filed a charge with the Equal Employment Opportunity Commission under 42 U.S.C. § 2000e-5(b) (1970). Although finding no probable cause, the Commission issued Plaintiff a right-to-sue letter. Finally, Plaintiff petitioned the Appellate Division of the New York Supreme Court, pursuant to N.Y. EXEC. LAW § 298 (McKinney 1972) and N.Y. CIV. PRAC. LAW §§ 7801-7806 (McKinney 1972) to set aside tbe Appeal Board's decision, compel reinstatement, and award back pay. The Appellate Division, limited under § 298 in its review by the findings of fact in the administrative proceedings, unanimously affirmed the decision of tbe Appeal Board. Under § 298, the Appellate Division's decision is final, subject to review only by the New York Court of Appeals. Plaintiff did not seek such review.

5. Recognized policy considerations include the importance of agency conciliation efforts in civil rights litigation and the undesirability of allowing the state proceedings encouraged by the Civil Rigbts Act of 1964 to preempt claims brought under § 1981.

6. Mitchell v. National Broadcasting Co., 418 F. Supp. 462 (S.D.N.Y. 1976).

7. 168 U.S. 1 (1897) (two previous Supreme Court cases beld to have finally determined the rights contested in the case at bar).

8. *Id.* at 48. A corollary to this rule is that it is immaterial whether the prior decision was decided correctly; only a showing of lack of jurisdiction over the question will defeat the application of res judicata. *See* Milliken v. Meyer, 311 U.S. 457, 462 (1940).

The principle of res judicata articulated by the *Southern Pacific* Court reflects "considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations."[9] The Court in *Rooker v. Fidelity Trust Co.*[10] recognized the plight of overburdened federal tribunals faced with collateral challenges to state court decisions on federal questions and extended the principle of res judicata, ruling that federal courts must apply res judicata to state court determinations of federal questions once the state court assumes jurisdiction of the federal issue. In addition, the Court has determined that 28 U.S.C. § 1738,[11] which requires the federal judiciary to grant state court decisions the same full faith and credit due them in the state of their origin, requires federal courts to consider the res judicata effect of a state court proceeding within that state.[12] Furthermore, the Court has acknowledged that res judicata may preclude federal court adjudication of issues resolved in administrative proceedings.[13] The Court has indicated, however, that the doctrine does not necessarily compel federal court deferral to state court decisions on federal issues or to administrative determinations. Although the Court in *England v. Louisiana State Board of Medical Examiners*[14] held that res judicata attaches when a plaintiff voluntarily submits a federal question to a state court,[15] it distingnished

9. 168 U.S. at 48-61.

10. 263 U.S. 413 (1923). Following Supreme Court refusal to review a state court decision, plaintiffs challenged the results of the state action in federal district court, claiming the state decision violated the contract clause and the fourteenth amendment of the Constitution. The Court held that a state court decision on a federal question properly hefore it could not be attacked collaterally in federal court; appeal to the United States Supreme Court provided the only relief available. *See also* Becher v. Contoure Laboratories, Inc., 279 U.S. 388 (1929) (Court recognized as binding under collateral estoppel a state court decision despite a grant to the federal courts of exclusive jurisdiction in patent infringement cases). *But see* note 15 *infra* and accompanying text.

11. 28 U.S.C. § 1738 (1970) provides in part:

> Such Act, records and judicial proceedings or copies thereof, so authenticated (by seal or certification), shall have the same full faith and credit in every court within tbe United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they were taken.

12. *See* Riley v. New York Trust Co., 315 U.S. 343, 349 (1942) (construing the predecessor to § 1738).

13. United States v. Utah Constr. and Mining Co., 384 U.S. 394 (1966) (dispute over delay damages and alleged added work before the Advisory Board of Contract Appeals prior to a court challenge).

14. 375 U.S. 411 (1964). Appellants, Louisiana cbiropractors challenging the educational requirements of the Louisiana Medical Practice Act, brought suit in the Louisiana courts after the federal district court abstained pending the decision of a state law issue. Once in the state court, the appellants presented and argued federal as well as state questions. After an adverse decision and a futile appeal to the Louisiana Supreme Court, appellants sought to reassert their claim in federal district court.

15. The Court held that although plaintiffs were forced into state court by federal

the situation in which a plaintiff is forced through appeal by an opposing party or by a federal court's temporary abstention to litigate a cause of action in state court that necessarily involves a federal question. In *United States v. Utah Construction and Mining Co.*[16] the Court suggested that res judicata should attach to administrative decisions only when an agency acts in a judicial capacity and the parties have an adequate opportunity to litigate the issues.[17]

The Court also has acknowledged that congressional intent to provide a federal forum may require flexibility in the application of res judicata. In *Kalb v. Fuerstein*[18] the Court ruled that a grant of exclusive jurisdiction indicated a congressional intent that the federal courts retain plenary power. Thus the failure of a party to litigate an issue in state court was held not to have binding effect in a federal action.[19] Relying on *Kalb,* the Court of Appeals for the District of Columbia in *Denver Building and Construction Trades Council v. NLRB*[20] held that res judicata should not apply if the result would be inconsistent with procedures for relief established by Congress.[21]

Courts have recognized that policies supporting a federal forum for civil rights claims may override the application of res judicata. In *Alexander v. Gardner-Denver Co.,*[22] an employment discrimina-

abstention on a state question, res judicata attached since plaintiffs had voluntarily submitted the federal question in state court.

16. 384 U.S. 394 (1966).

17. *Id.* at 422.

18. 308 U.S. 433 (1940).

19. The Court held that the language and broad policy of the exclusive grant of jurisdiction to the federal courts in bankruptcy proceedings was sufficient to override the application of res judicata. The Court's holding seems to conflict with the holding of *Becher.* The Court, however, did not rule that a grant of exclusive jurisdiction necessarily precludes res judicata; exclusive jurisdiction merely indicates congressional intent to provide a federal forum. Presumably congressional intent would be weighed against the need for finality in each case.

20. 186 F.2d 326, 332 (D.C. Cir. 1950), *rev'd on other grounds,* 341 U.S. 675 (1951) (order of the National Labor Relations Board challenged in the court of appeals subsequent to a related district court decision).

21. Congress established a procedure by which unfair labor practices faced preliminary challenge before the federal courts and final determination before the NLRB. *See also* American Mannex Corp. v. Rozands, 462 F.2d 688 (5th Cir.), *cert. denied,* 409 U.S. 1040 (1972); Lyons v. Westinghouse, 222 F.2d 184 (2d Cir.), *cert. denied,* 350 U.S. 825 (1955). In *American Mannex,* an action by Louisiana taxpayers contesting the validity of the state property taxes, the court recognized the principle of res judicata (called "judicial estoppel" in Louisiana). It indicated, however, that "other well-defined federal policies, statutory or constitutional, may compete with those policies underlying section 1738." 462 F.2d at 690.

22. 415 U.S. 36 (1974). Petitioner alleged racial discrimination as the cause of his discharge from employment and brought an action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f)(1) (1970 & Supp. V 1975). The United States District Court for the District of Colorado granted the employer's motion for summary judgment on the grounds that the issue of discrimination had been resolved in a previous arbitration.

tion suit under Title VII of the 1964 Civil Rights Act, the Court recognized that Congress intended to give the policy against racial discrimination the "highest priority"[23] by allowing an individual to pursue his rights under Title VII[24] independently of relief available under other state and federal statutes.[25] Finding that Congress had given the federal courts final responsibility for the enforcement of Title VII,[26] the Court held that neither the submission of issues to an arbitrator nor the presence of parallel or overlapping remedies precludes de novo federal review under Title VII.[27]

In *Taylor v. New York City Transit Authority*[28] the court considered the res judicata effect of an administrative proceeding on a federal civil rights action. Recognizing that res judicata should not be applied mechanically[29] to administrative determinations, the district court listed three factors for determining whether res judicata should attach to decisions of a state administrative body: (1) the effect accorded such determinations by the courts of the jurisdiction in which they are made; (2) the type of hearing held and the procedures followed by the agency; and (3) the intention of the administrative body and the expectations of the parties on the question of finality.[30] Administrative proceedings generally have not affected subsequent federal actions under Title VII. In *Batiste v. Furnco*

23. 415 U.S. at 47.

24. *Id.* While § 1981 provides in general for full and equal benefit of the law for all persons, Title VII is directed specifically against employment discrimination on the basis of race, color, religion, sex, or national origin. Title VII further provides explicit regulations and standards for avoiding employment discrimination and creates the Equal Employment Opportunity Commission to enforce and implement the Title VII provisions. *See* note 1 *supra. See also* Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 461 (1975) (Title VII and § 1981 augment each other and are not mutually exclusive).

25. The Court specifically referred to §§ 1981 and 1983 as remedies paralleling the Title VII remedies. 415 U.S. at 47 n.7.

26. *Id.* at 44.

27. *Id.* at 47, 49. In Younger v. Harris, 401 U.S. 37 (1971), the Court described circumstances allowing federal intervention in a state criminal proceeding under 28 U.S.C. § 2283. The Court held that a federal civil rights action could be brought only when there was danger of irreparable harm to the defendant's rights. In Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), the Court remanded a district court decision for failing to apply the *Younger* standard of extraordinary circumstances to civil actions under 42 U.S.C. § 1983. While these cases indicate the reluctance to override res judicata, the reasoning of *Alexander* and other civil rights actions, discussed *infra,* is more relevant to the instant case.

28. 309 F. Supp. 785 (E.D.N.Y.), *aff'd,* 433 F.2d 665 (2d Cir. 1970). Plaintiff, discharged for alleged misconduct involving violence, previously had challenged his dismissal before the Civil Service Commission.

29. 309 F. Supp. at 791. The court stated that the required balancing is especially delicate when an individual's constitutional rights must be weighed against respect for the state's adjudicatory system.

30. *Id.* The court stated that several factors might be considered, but specifically listed the three noted in text.

Construction Corp.[31] plaintiffs brought a Title VII action after an appeal by defendant to the state circuit court caused the stay of an administrative order.[32] Finding that res judicata had been "squarely rejected" in a Title VII action subsequent to a final state administrative determination,[33] the court held that Congress intended that the federal courts engage in de novo review of a Title VII claim even when state proceedings have reached a final determination.[34] In *Benneci v. Department of Labor*[35] the district court refused to apply res judicata in a Title VII action although the plaintiff had appealed an adverse decision of the Division of Human Rights to the Appellate Division of the New York Supreme Court.[36] Relying on *Alexander*,[37] the court ruled that affirmance by the Appellate Division was irrelevant because that court could not engage in de novo review.[38]

Courts have recognized that section 1981 provides a remedy for victims of racial discrimination similar to that provided by Title VII.[39] Furthermore, in *Hollander v. Sears, Roebuck & Co.*[40] the dis-

31. 503 F.2d 447 (7th Cir. 1974).

32. The Illinois Fair Employment Practices Commission had ordered defendant to cease and desist discriminatory employment practices. Defendant's appeal to the state court automatically resulted in a temporary stay of the Commission's order. The appeal was still pending when the federal action was before the court of appeals.

33. *See* Cooper v. Phillip Morris, Inc., 464 F.2d 9 (6th Cir. 1972) (the circuit court rejected the application of res judicata to agency action in a Title VII action).

34. 503 F.2d at 450. *See also* Voutsis v. Union Carbide Corp., 452 F.2d 889 (2d Cir. 1971).

35. 388 F. Supp. 1080 (S.D.N.Y. 1975).

36. Plaintiff first filed a complaint with the Division of Human Rights, was represented by counsel before a Division hearing, and was defeated. He then appealed to the State Human Rights Appeal Board, which affirmed the decision. Finally, pursuant to N.Y. EXEC. LAW § 298, he appealed to the Appellate Division, which affirmed the decision of the Board of Appeal. *See also* Young v. South Side Packing Co., 369 F. Supp. 59 (E.D. Wis. 1973) (findings of state agency in a racial discrimination action under Title VII held not binding although affirmed by state court).

37. *See* notes 22-27 *supra* and accompanying text.

38. 388 F. Supp. at 1082. The Second Circuit also has declined to apply res judicata in an action under § 1983, which forbids deprivation of civil rights under color of state law. In *Lombard v. Board of Education*, 502 F.2d 631 (2d Cir. 1974), *cert. denied*, 420 U.S. 976 (1975), the circuit court held that policy considerations precluded the application of the doctrine when plaintiff claimed that a prior agency hearing violated his fourteenth amendment right to due process. The court also found that plaintiff could not have raised his due process challenge in the agency hearing and that he was not required to raise the issue in his appeal to the state court. *But see* Hanzimanolis v. Codd, 404 F. Supp. 719 (S.D.N.Y. 1975), *aff'd mem.*, 538 F.2d 309 (2d Cir. 1976) (when plaintiff had raised a federal civil rights question in a prior state judicial proceeding, the district court held that he could not raise the same claim under § 1983).

39. *See, e.g.*, Windsor v. Bethesda Gen. Hosp., 523 F.2d 891 (8th Cir. 1975) (§ 1981 applicable to private actions for employment discrimination based on race); Sanders v. Dobbs Houses, Inc., 431 F.2d 1097 (5th Cir. 1970), *cert. denied*, 401 U.S. 948 (1971) (employee

trict court held that state court affirmance of an agency action dismissing plaintiff's complaint under section 1981 because of improper service on the defendant did not bar further litigation.[41] Analyzing the administrative proceedings, the court found that the absence of a hearing or opportunity for plaintiff to argue his version of the facts precluded the application of res judicata to the agency determination.[42] By providing a de novo hearing for plaintiff's claim of racial discrimination, the *Hollander* court recognized that res judicata might not attach in a section 1981 action and further that a federal court may look past a state court affirmance and review the proceedings of a state agency. Thus, prior to the instant case, federal courts applied res judicata in civil rights actions only after the plaintiff had received a judicial hearing comparable to a de novo federal action.

III. THE INSTANT OPINION

Applying the *Southern Pacific* "right, question, or fact" standard, the instant court[43] ruled that the state judicial proceedings had res judicata effect barring Plaintiff's action under section 1981. The court found the agency standards for determining the existence of probable cause for Plaintiff's racial discrimination claim[44] identical to the standards a federal court would apply in considering a motion for summary judgment or a motion to dismiss for failure

discharged allegedly hecause she was black could state a claim against a private employer under § 1981).

40. 392 F. Supp. 90 (D. Conn. 1975) (alleged racial discrimination against a white male who applied for an internship with defendant's program for minority students).

41. 392 F. Supp. at 95. The state court dismissed the appeal because of untimely and improper service in the state action. Since the dismissal was not on the merits, the district court held that it should not bar a subsequent action. The court cited § 49 of the *Restatement of Judgments,* which states:

> Where a valid and final personal judgment not on the merits is rendered in favor of defendant, the plaintiff is not thereby precluded from thereafter maintaining an action on the original cause of action and the judgment is conclusive only as to what is actually decided.

RESTATEMENT OF JUDGMENTS § 49 (1942).

42. The Connecticut Commission on Human Rights and Opportunities dismissed plaintiff's complaint based on the findings of a state investigator that the complaint lacked evidentiary support. Because of the investigator's determination, the Commission did not conduct a hearing or give plaintiff any opportunity to present his complaint.

43. The opinion of the court was by Mishler, District Judge, with Lumbard, Circuit Judge, joining.

44. The Division was required to determine within fifteen days after the complaint was filed whether there was probable cause to believe that the person(s) named in the complaint committed unlawful discriminatory acts. Mitchell v. National Broadcasting Co., 553 F.2d 265, 270 (1977).

to state a claim.[45] Stating that neither res judicata nor the full faith and credit requirements of section 1738 depend upon the absence of error,[46] the court noted that Plaintiff's action challenged the merits of the state decision rather than the standard applied. Nevertheless, the court examined the sufficiency of the agency hearing, concluding that the agency procedures provided a full and fair hearing on the legal sufficiency of Plaintiff's claim.[47] The court applied the remainder of the *Taylor* standard to the state judicial proceedings,[48] reasoning that the finality of the Appellate Division review and Plaintiff's decision to seek review supported the application of res judicata.

The court recognized that policy considerations overriding the application of res judicata in a Title VII action might be relevant to a section 1981 claim,[49] but dismissed these policy arguments because Plaintiff could have presented her case to the appropriate state agency without seeking judicial review and still brought a section 1981 action in federal court. Drawing a distinction between state administrative and judicial proceedings, the court held that res judicata attached only when a plaintiff chose to appeal the administrative decision to the state courts.[50] The court found no reason to believe that the resolution by the state court would be any less appropriate than resolution in a federal proceeding, thus dismissing Plaintiff's contention that Congress contemplated overlapping state and federal actions.[51]

Accepting *arguendo* the majority's position that a state court decision normally should have res judicata effect, the dissent[52] contended that the policy considerations present in a racial discrimination case override the section 1738 rule. The dissent saw no reason

45. *See* FED. R. CIV. P. 12(b) & 56.

46. 553 F.2d at 272. The court cited Milliken v. Meyer, 311 U.S. 457 (1940).

47. The court noted that before the Division of Human Rights may dismiss a complaint, it must be apparent that the complaint lacks merit as a matter of law. Further, the Division is required to give full credence to the complainant's version of events. 553 F.2d at 272-73.

48. *Id.* at 273. The court's use of the *Taylor* standard in regard to the court proceedings is incongruous with the purpose of the standard, since the *Taylor* standard was designed for analysis of administrative rather than judicial proceedings.

49. The court cited Gresham v. Chambers, 501 F.2d 687 (2d Cir. 1974), in support of the position that policies affecting Title VII actions could be relevant to an action under § 1981. 553 F.2d at 275. The court in *Gresham* found that Title VII was intended to supplement § 1981, not to serve as a substitute for it. 501 F.2d at 691.

50. 553 F.2d at 276. The court apparently followed the holding in England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964), requiring that the consideration by the state court be the result of voluntary submission by the plaintiff in the federal action.

51. 553 F.2d at 276. *See* notes 22 & 34 *supra* and accompanying text.

52. Judge Feinberg dissented. 553 F.2d at 277-80.

to distinguish the remedies provided by Title VII and section 1981 and asserted that the congressional intent to provide a federal fact-finding forum recognized in *Benneci* applies equally to an action under section 1981. Since the state court decision merely affirmed the results of an informal agency investigation in which Plaintiff had not been represented by counsel, the dissent contended that the policies supporting de novo review should be given particular emphasis. In the absence of an independent inquiry into the merits by a state court,[53] the dissent argued that the federal courts should be particularly reluctant to grant res judicata effect to the state court determination.

IV. COMMENT

By mechanically applying the doctrine of res judicata and emphasizing Plaintiff's voluntary resort to the state judiciary, the instant court fails to implement the high priority established by Congress for the correction of racially motivated employment discrimination. The court's application of the *Taylor* standard to the combined administrative and judicial proceedings does not inspect properly the nature of the agency action standing alone[54] and leaves future courts without a workable test for determining the application of res judicata in civil rights cases.

Although purporting to examine the type of hearing used by the agency, the court ignores the importance of the procedures used in that hearing.[55] The "informal discussions"[56] conducted by the Division of Human Rights in the absence of counsel for Plaintiff are not the type of hearings that automatically should be accorded the significance of a judicial proceeding.[57] The standards used by the Divi-

53. The dissent evidently failed to recognize that on a motion under rules 12(b)(6) or 56, there would have been no requirement of a determination of the facts, even if the case had been in federal court.

54. Strict adherence to the court's interpretation of § 1738, that application of res judicata is required once the state court has acted, should not allow review of the agency action. The procedure of the state agency should not have affected the application of res judicata, since other state courts would have accorded the court decision res judicata effect in any event.

55. The second part of the *Taylor* standard calls for examination of the procedures used a well as the type of hearing held.

56. *See* note 4 *supra*. It is not clear exactly what procedures were used in the agency hearing. Although the court compares the hearings to those used in determining a motion for summary judgment or to dismiss for failure to state a cause of action, the description of the proceedings includes the presentation of documentary evidence on the part of NBC. If evidence was presented, the hearings were at least not strictly comparable to proceedings under rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

57. The court's description of the Division of Human Rights proceedings suggests that

sion in reaching its conclusion are irrelevant if the procedures followed do not afford the protections of a court hearing. Furthermore, by weighing the finality of the court proceedings rather than the finality of the agency hearing, the court improperly grants to the Division hearings the weight of a court trial.[58]

In analyzing the policies that might override the application of res judicata in a civil rights claim,[59] the court draws an artificial distinction between plaintiffs who are forced to adjudicate federal issues in state court and those who voluntarily submit federal claims to the state judiciary. The court in *Hollander* did not impose a requirement that the resort to state court be involuntary, yet the instant court summarily dismissed the relevant policy considerations because Plaintiff could have stopped short of state judicial review. Implicit in the court's decision is a failure to recognize the position expressed in *Alexander* that federal remedies for employment discrimination are independent of state actions.[60]

The dissent, in contrast, properly recognizes that policies supporting the availability of federal forums must be given great weight in a civil rights action, but fails to emphasize the standards for determining whether such policy considerations are sufficient to override the policies supporting res judicata.[61] Although briefly discussing the relevance of *Alexander, Benneci,*[62] and other Title VII cases to a section 1981 action, the dissent does not analyze the holdings of those cases to create a basis for its position that Congress intended to provide both state and federal remedies for victims of employment discrimination and that the policies supporting a Title VII action also support an action under section 1981. Its ad hoc analysis of the application of res judicata in such cases fails to present a strong case for a de novo federal proceeding.[63]

Plaintiff was confronted with evidence presented by counsel for NBC in two different "discussions" held by two different officials. There is no indication that Plaintiff was aware of the requirements that she show probable cause for her complaint or that she knew that the findings of the hearings themselves could foreclose another action.

58. By interspersing discussion of the agency hearing with the judicial proceedings, the court also avoided discussion of the state court's inability to make its own determinations of fact. *See* note 4 *supra.*

59. *See* text accompanying notes 23-27 *supra.*

60. *See* notes 23-26 *supra* and accompanying text. Although *Alexander* was a Title VII case, the policies applying to it were conceded by the court to be relevant to a remedy under § 1981. *See* note 49 *supra* and accompanying text.

61. *See* text accompanying notes 23-27 *supra.*

62. It is surprising that the dissent did not rely on *Hollander* or rely more heavily on *Benneci* once it determined that the policies behind Title VII are comparable to those supporting § 1981.

63. The dissent also failed to discover the weakness of the court's analysis of the admin-

The better course would be to follow the holding in *Hollander* and determine first whether a state court decision should be granted res judicata effect standing alone. The second step in a case such as *Mitchell,* in which there is only limited review by a state court, would require full analysis by the district court of the administrative proceeding, utilizing the three factors articulated in the *Taylor* standard.[64] The court should give particular attention to the second part of the *Taylor* test, which compares the type of agency proceeding and the procedural protections in that proceeding with those available in a federal court. If the *Taylor* requirements are met by the administrative proceeding, the court should, as a final step, analyze appropriate policy considerations to determine whether congressional intent precludes the application of res judicata.

Application of the foregoing analysis to the instant case reveals that res judicata should not have precluded federal adjudication of Plaintiff's section 1981 challenge. Since the state court proceedings consisted only of affirmance after limited review,[65] the administrative proceedings should have been examined under the *Taylor* test. Absent counsel for Plaintiff and formal procedures similar to those provided in a court proceeding,[66] the agency hearings could not provide the same opportunity for relief available in a court action and thus should not have been accorded the weight of a full court hearing. Finally, the court should have reviewed the policy considerations recognized in *Alexander* and applied them to the instant case.[67] The evident congressional intent to provide a federal forum in employment discrimination cases should have been sufficient to override the application of res judicata, especially in light of the informal nature of the state administrative hearings. That Plaintiff chose to bring her federal action under section 1981 rather than Title VII is irrelevant since in either case congressionally recognized policy calls for an available federal remedy. The instant court's application of res judicata despite contrary policy considerations could result in more limited access to the federal courts in civil rights actions.

R. PRESTON BOLT, JR.

istrative proceedings under the *Taylor* standard. By accepting *arguendo* the court's position that res judicata should apply in the absence of countervailing policies, the dissent ignores that Plaintiff was not accorded a hearing of the same type available in court.

64. *See* text accompanying notes 28-30 *supra.*

65. *See* note 4 *supra.*

66. *Id.*

67. Although policy considerations may change depending on the type of case before the court, the court's concession that policies applicable in *Alexander* are relevant to the *Mitchell* case should provide a sufficient basis for determining the policies to he considered in a § 1981 action.

Environmental Law—Standing to Sue—Alleged Violation of Private Party's Informational Interest in Environmental Impact Statement is Sufficient to Establisb Standing to Enforce National Environmental Poliey Act

I. Facts and Holding

Plaintiffs[1] sought a declaratory judgment that a final environmental impact statement (EIS)[2] filed by defendant[3] Corps of Engineers failed to comply with the requirements of section 102(2)(C) of the National Environmental Policy Act (NEPA).[4] Defendant filed a motion to dismiss, arguing that a private party could not enforce section 102(2)(C)'s EIS requirement for proposed legislation and that plaintiffs did not have standing to enforce section 102(2)(C) because they had not alleged an injury in fact[5] sufficient to satisfy the constitutional "case or controversy" requirement.[6] The United States District Court for the District of Columbia, *held*, Defendant's motion denied. Because section 102(2)(C) of the NEPA confers on the public a right to environmental impact information, private parties may enforce the section, and loss of information caused by a violation of the section is an injury in fact sufficient to establish standing in members of the public desiring environmental informa-

1. This case consolidated for trial two suits against the same defendant. Plaintiffs in each suit included one named and several unnamed parties. The named plaintiffs were the Atchison, Topeka & Santa Fe Railway and the Izaak Walton League of America, an environmentalist organization.

2. The purpose of an environmental impact statement is to provide information on the environmental repercussions of proposed legislation and other major federal actions.

3. The named defendant in each case was Howard H. Calloway, a representative of the United States Corps of Engineers.

4. The National Environmental Policy Act of 1969, § 102(2)(C), 42 U.S.C. § 4332(2)(C) (1970), provides in relevant part:

> (2) all agencies of the Federal Government shall—
>
> (c) include in every recommendation or report on proposals for legislation and other major Federal actions siguificantly affecting the quality of the human environment, a detailed statement by the responsible official on—
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship hetween local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

5. For a discussion of this requirement, see note 31 *infra* and accompanying text.

6. For a discussion of this limitation, see notes 20-21 *infra* and accompanying text.

tion. *Atchison, Topeka & Santa Fe Railway v. Callaway*, 431 F. Supp. 722 (D.D.C. 1977).

II. LEGAL BACKGROUND

Section 102(2)(C) of NEPA requires that federal agencies include an EIS "in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment."[7] Although the statute does not specify a procedure for enforcing section 102(2)(C), several courts have allowed private parties to enforce its EIS requirement.[8] An analysis of the cases reveals a two-fold approach[9] to the issue.[10] First, the courts have determined that Congress, in passing section 102(2)(C), intended not only to acquire information for itself, but also to provide environmental information to the public. Second, the courts have relied upon the provisions of the Administrative Procedure Act[11] that authorize judicial review of an agency's actions.

The majority of cases allowing private suits to enforce section 102(2)(C) have concerned an EIS accompanying a proposal for

7. 42 U.S.C. § 4332(2)(C) (1970).

8. *See, e.g.*, United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973); Sierra Club v. Morton, 395 F. Supp. 1187 (D.D.C. 1975), *aff'd*, No. 75-1781 (D.C.Cir. Mar. 8, 1976); Environmental Defense Fund v. Corps of Eng'rs, 342 F. Supp. 1211 (E.D. Ark.), *aff'd*, 470 F.2d 289 (8th Cir. 1972), *cert. denied*, 412 U.S. 931 (1973); Izaak Walton League of America v. Macchia, 329 F. Supp. 504 (D.N.J. 1971).

9. The approaches used by these courts do not conform to the format that the United States Supreme Court set forth in Cort v. Ash, 422 U.S. 66 (1975). In that case the Court articulated four general factors that a court should consider in determining whether a private party may enforce a statutory mandate if the statute does not provide for a private remedy. Under *Ash* a court should consider:

(1) whether the plaintiff is a member of the class for whose benefit the statute was enacted.

(2) whether the legislature intended to create such a remedy.

(3) whether an inference of such a remedy is consistent with the underlying purposes of the legislation.

(4) whether the cause of action is traditionally related to state law so that to infer a cause of action based solely upon federal law would be inappropriate.

Id. at 78. Although the analyses used by the courts prior to *Ash* to allow private parties to enforce § 102(2)(C) did not follow the format later set forth in *Ash*, the courts did consider the factors articulated in the *Ash* decision; therefore the decisions should remain as valid precedent even after the decision in *Ash*.

10. Courts generally combine the discussion of whether *any* private party may enforce § 102(2)(C) with the discussion of whether the particular plaintiff in each case has satisfied the requirements of the standing doctrine. *See, e.g.*, United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973).

11. Administrative Prodecure Act § 10(a), 5 U.S.C. § 702 (1966) provides: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

agency action.[12] Three cases, however, have considered whether private parties may enforce the EIS requirement for proposed legislation. The courts in *Sierra Club v. Morton*[13] and *Environmental Defense Fund v. TVA*[14] allowed private parties to enforce the requirement.[15] The only decision to the contrary is *Wingfield v. Office of Management and Budget*,[16] in which the court, without analysis, stated that a private party did not have a right to enforce the section 102(2)(C) EIS requirements for legislative proposals.[17] Because section 102(2)(C) does not distinguish between proposals for legislation and proposals for agency action in its EIS requirement, and because the *Wingfield* opinion fails to justify its departure from cases allowing private rights of action to enforce EIS requirements, courts probably will continue to allow private parties to enforce the requirement for proposed legislation.

In each of the cases addressing the issue whether a private party may enforce the section 102(2)(C) EIS requirement, the court also had to resolve the more difficult and important issue of whether the particular plaintiff had standing to sue. Although the two issues

12. *See, e.g.*, Virginians for Dulles v. Volpe, 541 F.2d 442 (4th Cir. 1976); Environmental Defense Fund, Inc. v. Corps of Eng'rs, 342 F. Supp. 1211 (E.D. Ark.), *aff'd*, 470 F.2d 289 (8th Cir. 1972), *cert. denied*, 412 U.S. 931 (1973).

13. 395 F. Supp. 1187 (D.D.C. 1975), *aff'd*, No. 75-1781 (D.C. Cir. Mar. 8, 1976).

14. 339 F. Supp. 806 (E.D. Tenn.), *aff'd*, 468 F.2d 1164 (6th Cir. 1972).

15. The courts in *Sierra Club* and *Environmental Defense Fund* did not specifically address the question whether a private party could enforce the EIS requirements of § 102(2)(C) for proposed legislation. One must assume, however, that in allowing the private parties in the cases to enforce § 102(2)(C) the courts in fact considered the question and answered it in the affirmative.

16. 7 ENVIR. REP. 20,362 (D.D.C. Apr. 4, 1977).

17. In *Wingfield* the plaintiff requested an injunction to prevent congressional committees from obtaining information relating to proposed legislation prior to the filing of an EIS. The analysis by the *Wingfield* court, which led to its conclusion that a private plaintiff may not enforce EIS requirements for proposed legislation, is as follows:

> This particular provision [section 102(2)(C)], however interpreted, was designed solely to aid the Congress and was not intended to create a right of action in a private party to claim injury in some fashion from the ongoing legislative process.
>
> Congress has within its own investigatory and other resources ample means to obtain from the Executive whatever information it desires relating to environmental impact prior to taking action. It is clear, of course, that Congress did not intend to stultify itself by this legislation if at any point it was satisfied it had enough information to proceed in a given situation.
>
> The ability of Congress by various means at its disposal to obtain whatever environmental information it deems necessary to perform its function is, of course, undisputable.
>
> For the court to interject itself into the complexities of the ongoing legislative process at the behest of a private party would require the clearest kind of directive from Congress, which is not present here.

Id. at 20,362-63.

are inherently intertwined,[18] the standing issue has proven to be a more stringent restriction on a private party's ability to bring an action to enforce section 102(2)(C).[19] The doctrine of standing to sue is a combination of constitutional and prudential considerations that operate to limit access to federal courts. The principal underpinning of the doctrine is the Constitution's requirement[20] that an issue be presented in the form of a case or controversy in order to invoke the authority of the federal judiciary.[21] The essence of this requirement is that a plaintiff must allege a personal stake in the outcome of the controversy in order to assure that the issues are presented with adverseness.[22] The Supreme Court has recognized that this "personal stake in the outcome" is the constitutional minimum required for standing under article III.[23]

In addition to the constitutional requirement, the Supreme Court has recognized certain prudential considerations that further limit a plaintiff's right to bring suit in federal court.[24] A federal court, for example, will not hear a case if the plaintiff is using the federal judiciary to air general grievances[25] or if the case is not presented in an adversary context.[26] In *Flast v. Cohen*[27] the Court expressly recognized that these prudential considerations are part of the doctrine of standing.

Relying upon the combination of constitutional and prudential

18. Courts presently apply a two-part test to determine whether a plaintiff has standing to sue. *See* note 31 *infra* and accompanying text. Under the second part of the test a plaintiff must be within the zone of interests sought to be protected by the statute. The question whether *any* private party has a right to sue to enforce a statutory requirement is closely related to and involves many of the same considerations as the question whether a particular plaintiff is within the zone of interests that are protected by that requirement.

19. *See, e.g.*, Sierra Club v. Morton, 405 U.S. 727 (1972); Sadler v. 218 Housing Corp., 417 F. Supp. 348 (N.D. Ga. 1976); Concerned About Trident v. Schlesinger, 400 F. Supp. 454 (D.D.C. 1975).

20. U.S. CONST. art. III, § 2.

21. *See* Baker v. Carr, 369 U.S. 186 (1962); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

22. Baker v. Carr, 369 U.S. 186, 204 (1962).

23. Flast v. Cohen, 392 U.S. 83, 101 (1968).

24. *See, e.g.*, Association of Data Processing Serv. v. Camp, 397 U.S. 150 (1970); Flast v. Cohen, 392 U.S. 83 (1968); Barrows v. Jackson, 346 U.S. 249 (1953).

25. *See* Warth v. Seldin, 422 U.S. 490, 499 (1975); United States v. Richardson, 418 U.S. 166, 175 (1974); Frothingham v. Mellon, 262 U.S. 447, 448 (1923).

26. *See* Baker v. Carr, 369 U.S. 186, 204 (1962). Although the requirement that issues be presented in an adversary context is one of the constitutional underpinnings of the standing doctrine, it also may raise prudential considerations. Because the purpose of the requirement is to assure that issues are presented in a form suitable for judicial resolution, courts are able to exercise much discretion in deciding when the requirement has been met. It is in this area of discretion that the requirement becomes a prudential consideration.

27. 392 U.S. 83, 97-98 (1968).

considerations, courts for many years took a restrictive position on the issue of standing. The courts held that prudential and constitutional considerations required a plaintiff to allege an invasion of a legal interest in order to acquire standing to sue[28] and thus severely limited the category of persons who could acquire standing on a particular issue.

In 1970 the Supreme Court embarked on a line of decisions that greatly modified and relaxed the doctrine of standing. In *Data Processing Service v. Camp*[29] the Court indicated that invasions of aesthetic, conservational, recreational, or economic interests also can provide a basis for standing. The Court devised a two-pronged test for standing, requiring a plaintiff to show both injury in fact "economic or otherwise,"[30] and injury to an interest within the zone of interests protected by the statute or constitutional guarantee in question.[31] Applying this test in *Barlow v. Collins*,[32] the Court granted standing to a plaintiff who would not have been allowed to bring suit under prior interpretations of the standing doctrine.[33] Two years later the Court in *Sierra Club v. Morton*,[34] although denying standing on the basis of a "mere interest" in the environment, indicated that if a plaintiff alleged an invasion of his own aesthetic or recreational interests, he would have standing.[35] The Court's relaxation of the standing requirements culminated in *United States v.*

28. *See, e.g.*, Tennessee Elec. Power Co. v. TVA, 306 U.S. 118 (1939).

29. 397 U.S. 150 (1970).

30. *Id.* at 152.

31. The zone of interest prong of this test primarily addresses prudential considerations. The injury in fact prong, however, concerns constitutional restrictions on standing. The Court required injury in fact to assure that the plaintiff had a sufficient "personal stake in the outcome" to satisfy the case or controversy limitations placed on standing by article III. Courts continue to use the injury in fact test to determine whether a plaintiff has met the constitutional minimum required for standing. Although both prongs of the *Data Processing Service* test have been applied frequently since their inception in 1970, courts have applied each prong with differing degrees of stringency depending upon the United States Supreme Court's attitude toward standing at the time.

32. 397 U.S. 159 (1970) (decided the same day at *Data Processing Service*).

33. The district court in *Barlow*, relying upon prior interpretations of the standing doctrine, had denied standing because the plaintiff did not allege a direct invasion of a legal right. The plaintiffs in *Barlow* were tenant farmers who challenged a ruling of the Secretary of Agriculture on the grounds that it indirectly affected their ability to obtain credit. Applying the two-part test of *Data Processing Service*, the Court took a liberal position and granted standing on the basis of this alleged economic injury.

34. 405 U.S. 727 (1972).

35. In *Sierra Club* an environmentalist group challenged the building of a recreational facility in a national game refuge. In an attempt to satisfy the requirements of the standing doctrine the group stated that it had a general interest in the conservation of national parks and game refuges. Even though the Court refused to grant standing on these grounds, it indicated that if the group or any of its members had alleged invasions of an aesthetic interest in or recreational uses of the area, standing would have been granted.

Students Challenging Regulatory Agency Procedures (SCRAP),[36] in which the court granted standing to plaintiffs who alleged only indirect and hypothetical injuries to their aesthetic and recreational interest in the environment.[37]

The Court further relaxed the standing doctrine by recognizing that Congress, within the limits set by article III of the Constitution,[38] could create standing in plaintiffs who otherwise could not meet the requirements of the standing doctrine. In *Trafficante v. Metropolitan Life Insurance Co.*,[39] the Court acknowledged the plaintiff's standing on the basis of a right of review granted by the Civil Rights Act of 1968,[40] even though standing would have been denied in the absence of the statute. The Court suggested in *Data Processing Services* that section 10(a) of the Administrative Procedure Act,[41] which authorizes judicial review of federal agencies' actions, could likewise give standing to persons adversely affected by an agency's decisions. Further, in *Hardin v. Kentucky Utility Co.*[42] the Court indicated its willingness to infer a statutory grant of standing if the language of a statute and its legislative history clearly manifest Congressional intent to provide a right of review to those in plaintiff's class.[43]

The cumulative result of these Supreme Court rulings was a substantial weakening of the doctrine of standing. By the time of the *SCRAP* decision in 1973 the doctrine had been relaxed to the point that some district courts felt it no longer provided a significant restriction on access to the federal judiciary.[44] In three recent cases,

36. 412 U.S. 669 (1973).

37. *SCRAP* involved a challenge to an EIS filed under section 102(2)(C) of NEPA. The plaintiff, a student environmentalist group, gained standing by alleging that a proposed railroad freight surcharge on recyclable goods would increase the use of, and therefore the littering of, nonrecyclable goods, thereby damaging the environment in the parks in the District of Columbia area, which plaintiffs claimed they used for recreational purposes.

38. For a discussion of these limits, see notes 20-21 *supra* and accompanying text.

39. 409 U.S. 205 (1972).

40. 42 U.S.C. § 3610 (1970) provides in relevant part:

(d) If within thirty days after a complaint is filed with the Secretary or within thirty days after expiration of any period of reference under subsection (c), the Secretary has been unable to obtain voluntary compliance with this title, the person aggrieved may, within thirty days thereafter, commence a civil action in any appropriate United States district court, against the respondent named in the complaint, to enforce the rights granted or protected by this title, insofar as such rights relate to the subject of the complaint.

41. For the text of this section, see note 11 *supra*.

42. 390 U.S. 1 (1968).

43. The Court suggested that Congress' intent to give a particular plaintiff or class of plaintiffs a right to bring an action must be clearly apparent before a congressional grant of standing will be inferred.

44. Reservists Committee to Stop the War v. Laird, 323 F. Supp. 833 (D.D.C. 1971),

however, the Supreme Court halted relaxation of the standing doctrine. The Court denied standing in *United States v. Richardson*,[45] *Schlesinger v. Reservists Committee to Stop the War*,[46] and *Warth v. Seldin*,[47] stating that a plaintiff still must demonstrate injury in fact to establish standing. The Court also indicated that prudential considerations were important factors in any decision on the issue of standing.[48] In *Richardson* the Court denied the plaintiff standing, relying in part on its determination that the plaintiff was seeking admission to a federal court merely to air his generalized grievances.[49] In addition, the Court in *Warth* and *Reservists* determined that a plaintiff's alleged injury must be sufficiently concrete and immediate in order to provide a basis for standing.[50] Thus these three cases indicate that the doctrine of standing continues to be a significant restriction on a plaintiff's right to sue in federal court.

Since the passage of NEPA in 1970, courts have decided questions of standing to enforce its provisions under the general rules applicable to the doctrine of standing.[51] Although early cases resolving questions of standing to enforce NEPA, such as *SCRAP*, were a part of the pattern of relaxation of the doctrine of standing,[52] recent district court decisions have followed the Supreme Court's trend toward a more stringent application of the doctrine's limitations.[53]

III. The Instant Opinion

Before reaching the issue of standing, the court first considered whether any private plaintiff has a cause of action to enforce the section 102(2)(C) EIS requirement for legislative proposals.[54] The

rev'd sub nom. Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 (1974). *See* Broderick, *The Warth Optional Standing Doctrine: Return to Judicial Supremacy?*, 25 Cath. U.L. Rev. 467 (1976); 27 Hastings L.J. 213, 222 (1975).

45. 418 U.S. 166 (1974).

46. 418 U.S. 208 (1974).

47. 422 U.S. 490 (1975).

48. *See id.* at 499; United States v. Richardson, 418 U.S. at 175.

49. 418 U.S. at 175.

50. 418 U.S. at 220 (concrete injury is an indispensable element of a dispute capable of judicial resolution); 422 U.S. at 516 (plaintiff "failed to show the existence of any injury . . . of sufficient immediacy . . . .").

51. *See, e.g.*, United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973); Sadler v. 218 Housing Corp., 417 F. Supp. 348 (N.D. Ga. 1976).

52. *See* note 44 *supra* and accompanying text.

53. *See, e.g.*, Sadler v. 218 Housing Corp., 417 F. Supp. 348 (N.D. Ga. 1976); Concerned Ahout Trident v. Schlesinger, 400 F. Supp. 454 (D.D.C. 1975); Citizens for Food and Progress, Inc. v. Musgrove, 397 F. Supp. 397 (N.D. Ga. 1975).

54. The instant court addressed this issue as one of first impression. While there was significant authority for the proposition that EIS requirements for a federal agency's actions, proposals, and hearings could he enforced by private action, the court indicated that the EIS

court immediately faced the *Wingfield* decision, which had denied a private party the right to enforce section 102(2)(C) of NEPA as it related to proposed legislation. The court, however, distinguished *Wingfield* from the instant case by noting that the relief requested by the plaintiff in *Wingfield* would have interfered significantly with the legislative process, unlike the declaratory judgment requested in the instant case.[55] Next considering whether a private party could enforce section 102(2)(C) under the instant circumstances the court focused upon the purpose of the section and its EIS requirements and analyzed numerous cases[56] interpreting the section. The court found that each case indicated that one purpose of the section was to provide information to the public in order to encourage private participation in governmental decisionmaking. Noting that this interpretation was consistent with the langnage of NEPA, the court agreed that a major purpose of the EIS requirement for legislative proposals was to provide the public with information in order to permit participation in decision-making processes.

The court then focused upon the provisions of the Administrative Procedure Act[57] that authorize judicial review of a federal agency's actions. On the basis of this authorization and its holding that the public had an informational interest in an EIS, the court held that the EIS requirements of section 102(2)(C) relating to legislative proposals are enforceable by private suit.

Moving to the issue of standing, the court first noted that section 10(a) of the Administrative Procedure Act granted a right of judicial review to persons "adversely affected or aggrieved by agency actions within the meaning of a relevant statute."[58] Reiterating its holding that one purpose of section 102(2)(C) was to provide information to permit public participation in decisionmaking and also noting that plaintiffs were interested in the proposed legislation

requirements for legislation pending in Congress might require different considerations. *But see* note 15 *supra* and accompanying text.

55. While agreeing with the *Wingfield* court that § 102(2)(C) did not establish a private right of action to interfere with the legislative process, the court suggested that a request for a declaratory judgment involved different considerations. Atchison, T. & S. F. Ry. v. Callaway, 431 F. Supp. 722, 727 n.5 (D.D.C. 1977).

56. Sierra Club v. Morton, 510 F.2d 813 (5th Cir. 1975); Trout Unlimited v. Morton, 509 F.2d 1276 (9th Cir. 1974); Jones v. District of Columbia Redevelopment Land Agency, 499 F.2d 502 (D.C. Cir. 1974), *cert. denied*, 432 U.S. 927 (1975); Silvia v. Lynn, 482 F.2d 1282 (1st Cir. 1973); Environmental Defense Fund v. TVA, 339 F. Supp. 806 (E.D. Tenn.), *aff'd*, 468 F.2d 1164 (6th Cir. 1972).

57. For text of this section, see note 11 *supra*.

58. Administrative Procedure Act § 10(a), 5 U.S.C. § 702 (1970).

associated with the Corps of Engineers' EIS, the court held that the alleged violations of section 102(2)(C) adversely affected plaintiff's interests, and therefore plaintiffs were entitled to judicial review under the Administrative Procedure Act. Finally,[59] the court considered the constitutional "case or controversy" limitations on standing and the requirement of injury in fact.[60] Relying again on its statement of the purpose of section 102(2)(C), the court held that the alleged violations of the plaintiff's informational interests granted by the section were sufficient allegations of injury in fact to establish standing to sue.

IV. COMMENT

The instant court's holding that the section 102(2)(C) EIS requirement may be enforced by a right of private action is consistent with the language of section 102(2)(C)[61] and the majority of cases allowing private parties to enforce its EIS requirement. The court's use of this holding, however, to grant the plaintiff's standing to sue in the instant circumstances conflicts with decisions such as *Richardson, Reservists,* and *Warth,* which limit access to the courts by a strict application of the standing doctrine. The decision on standing is based upon the theory developed in *Data Processing Service, Trafficante,* and *Kentucky Utility Co.* that Congress has the power to establish standing in private parties to enforce congressionally created rights.[62] The court, however, fails to recognize that even when a private party sues to enforce statutory rights, both constitutional and prudential limitations continue to operate as a barrier to standing. The court correctly notes that an injury in fact is required to establish standing, but by holding that violations of the public's informational interest in an EIS satisfy this requirement, it disregards the prudential considerations expressly recognized by the Supreme Court.[63]

In both *Richardson* and *Warth* the Supreme Court stated that generalized grievances shared by the public at large were not a

59. In addition to the standing issue, the court, at the end of its opinion, summarily addressed the question whether it could shape appropriate relief. Holding that a declaratory judgment would be sufficient under the circumstances, the court decided the question in the affirmative.

60. For a discussion of the hackground of this requirement, see notes 20-24 & 31 *supra* and accompanying text.

61. For the text of this section, see note 4 *supra.*

62. For a discussion of this theory, see notes 39-43 *supra* and accompanying text.

63. *See* notes 24-26 *supra* and accompanying text.

sufficient injury in fact to establish standing.[64] The policy underlying the injury in fact requirement is that generalized grievances do not assure that the plaintiff has sufficient interest in an issue to present it with the "concrete adverseness"[65] required for judicial review. Adherence to this position may, at times, place particular issues outside the realm of judicial review, but, as the Supreme Court has correctly recognized, such issues are generally best suited for resolution by either political process or the legislative or executive branch of government.[66]

Although section 102(2)(C) of NEPA grants to the public an interest in EIS information, the interest is vested in the public as a whole, and any violations of the interest are common to every individual and organization. Consequently, in order to establish standing to redress violations of this informational interest, a plaintiff must show some additional injury. Cases such as *Data Processing Service, Sierra Club*, and *SCRAP* have established that invasions of a person's aesthetic or recreational interests may constitute this necessary additional injury. Plaintiffs who have acquired standing through such an injury in fact may validly enforce the public's informational interest granted by section 102(2)(C).[67] The court's holding, however, that invasion of a general informational interest alone is sufficient to bestow standing disregards the limitations of the standing doctrine that recently have been reaffirmed by the Supreme Court. Although informational interests are a valid concern of every individual and organization in today's society, any injuries caused by a violation of these interests should be redressed through the legislative or executive branch of government rather than through the federal judiciary.

KENNETH L. STEWART

64. Warth v. Seldin, 422 U.S. 490, 499 (1975); United States v. Richardson, 418 U.S. 166, 175 (1974). *See* text accompanying notes 48-50 *supra*.

65. Baker v. Carr, 396 U.S. at 204.

66. United States v. Richardson, 418 U.S. at 179.

67. *See* Sierra Club v. Morton, 405 U.S. at 737.